IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

COURT'S ORDER WHETHER THE CASE IS OR IS NOT
APPROVED FOR REPORTING
[Chapter VIII, Rule 32(2) (b)]
Description of case

First Appeal No. 892 of 2001 **Decided on : 2nd August, 2006**

A.F.R. (Approved for Reporting)
Not Approved for Reporting

Date. 02.08.2006

(Initial of Judge)

Note: Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judges for signature.

Reserved Judgment

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

First Appeal No. 892 of 2001
(Old No. 605 / 1983)

State of U.P. through
Divisional Forest Officer Bardi Nath,
Forest Division, District Chamoli

…….. Defendant - Appellant

Versus

1. Jaman Singh
2. Fateh Singh
   Both Sons of Sri Shiv Singh Rawat,
   R/o Joshimath, District Chamoli.

…..……. Plaintiff / Respondent

Mr. Nand Prasad, learned Standing Counsel for the State.
Mr. Pankaj Purohit, learned counsel for the respondents.

Hon'ble Prafulla C. Pant, J.

This appeal, preferred under Section 96 of the Code of Civil Procedure, 1908 (hereinafter referred as the Code), is directed against the judgment and decree dated 25.11.1983, passed in civil suit No. 26 of 1983, by learned District Judge, Chamoli, whereby suit for injunction has been decreed by the trial court.

2) I heard learned counsel for the parties and perused the lower court record.

3) Brief facts of the case are that plaintiffs / respondents filed a suit against defendant / appellant with the pleadings that in

August 1980, forest department of the defendant invited tenders for felling of 184 trees of ‘DEODAR’ (Cedar) and ‘KAIL’ in lot No. 63 / 1980-81 in first and second range of Dunagiri, Joshimath. The plaintiffs / respondents gave highest bid of Rs. 2,01,000/-, which was accepted by the defendant / appellant vide letter dated 13.08.1981. The defendant further sanctioned felling of 100 more trees in favour of the plaintiffs. Again, on 24.04.1982 vide letter No. I / 41 / P, the Divisional Forest Officer of the defendant sanctioned felling of further 30 trees valued at Rs. 81,482.09 in favour of the plaintiffs. Thus, in all plaintiffs were allowed to cut 314 trees in said lot. Accordingly, the plaintiffs started felling operations, which was to be completed, as per the contract, by 30.08.1982. It was not in dispute that plaintiffs paid entire amount of Rs. 2,97,783.13 towards cost of the trees excluding the late fee and the sales tax. It appears that certain complaints were made to the forest department against the plaintiffs that under the grab of aforesaid sanction they were cutting some trees illegally. After alleged enquiry on the part of the defendant, the Divisional Forest Officer, Badrinath vide his order dated 20.01.1983, directed the plaintiffs not to proceed with the felling operation in respect of lot No. 63 / 80-81. Apart from this, the defendant made a demand of Rs. 71,940.74 against the plaintiffs on 18.06.1983, for felling the trees illegally. Challenging the said demand and the order whereby the felling operation was directed to be stopped, a suit for injunction was filed by the plaintiffs for the relief that no embargo be made in lifting 400 sleepers lying on the aforesaid lot. A further relief was sought that the defendant be directed not to realize Rs. 71,940.74 from the plaintiffs.

4) The appellant / defendant contested the suit but admitted the under a time bound contract the trees as mentioned in the plaint, were allowed to be cut by the plaintiffs / respondents. It is further pleaded in the written statement that the plaintiffs violated the terms of the contract and on inspection it was found that there had been illegal felling of 15 more trees than the trees allowed to cut, as such, demand of Rs. 71,940.74 was made from them. In the written statement it was also pleaded the the suit is not maintainable as there is arbitration agreement between the parties to refer the dispute.

5) The trial court, after perusal of the pleadings of the parties framed following four issues:

i) *Whether, the plaintiffs have still to cut 16 more trees as per the sanction, worth Rs. 41,838.50 (Rs. 1,097.00 + Rs. 40,741.05), or the plaintiffs have already cut and removed 15 extra trees worth Rs. 71,940.74, if so , its effect?*

ii) Whether, court fee paid, is insufficient?

iii) *Whether, in the light of Clause 27 of agreement between the parties, the suit is premature and plaintiffs ought to have referred their claim for arbitration before instituting the suit?*

iv) *To what relief, if any, are the plaintiffs entitled?*

6) From the record, it appears that the plaintiffs adduced its evidence but defendant failed to adduce oral evidence, before the trial court, and the trial court proceeded under Order XVII Rule 3 of the Code, and decreed the suit in favour of the plaintiffs.

7) Learned Standing Counsel for the defendant / appellant argued that the trial court has erred in law by rejecting the adjuourment application of the defendant and proceeding under order XVII Rule 3 of the Code. It is further contended that on the day on which application for adjournment was rejected was not a date fixed for final hearing. I have carefully examined the record of the lower court. From the order sheet, it is clear that the defendant sought adjournment on 29.09.1983, 25.10.1983, 08.11.1983 and 21.11.1983, and all the dated were fixed for final hearing. However, on last date i.e. 21.11.1983, when both the parties were present, the trial court instead of proceeding forthwith under Rule 3 of Order XIVV of the Code, preferred to fix a date for orders on the adjournment application, and took up the case on next date i.e. 25.11.1983. On said date, it proceeded under Order XVII Rule 3 of the Code, and heard the arguments of the parties, and delivered the judgment. Rule 3 of Order XVII of the Code of Civil Procedure, 1908, reads as under:

> ***"3. Court may proceed notwithstanding either party fails to produce evidence, etc.*** *–Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, [the Court may, notwithstanding such default, -*
>
> *(a) if the parties are present, proceed to decide the suit forthwith, or*
>
> ***(b)*** *if the parties are, or any of them is absent, proceed under rule 2]."*

8) From the aforesaid rule it is clear that it is not necessary that the date fixed must be a date of final hearing. What is important is that opportunity to adduce evidence must have been given and parties must be present? Both the requirements were fulfilled in this case and, as such, there is no error of law committed by the trial court in proceeding the suit under Order XVII Rule 3 of the Code, in the above circumstances.

9) Second contention of learned Standing Counsel for the defendant / appellant is this that in view of the arbitration clause in the agreement, between the parties, the suit was not mainitainable before the trial court. In this connection, Section 34 of the Arbitration act, 1940, contains relevant provision, which reads as under:

> ***"34. Power to stay legal proceedings were there is an arbitration agreement.*** *–Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other pary to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statemnent or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to*

the proper conduct of the arbitration, such authority may make an order staying the proceedings."

It is also pertinine to mention here, Explanation 1 and 2 of the U.P. amendment, which was introduced through the U.P. Act No. 57 of 1976 to Section 34 of the Arbitration Act, 1940, and are reproduced hereunder:

> ***"Explanation 1*** *–Where the arbitration agreement provides for reference to a person by name or designation the fact that the arbitrator or the umpire so named or designated is na employee or, or is otherwise connected with, one of the parties, shall not by itself, be deemed to be a sufficient reason for not referring the matter in accordance with the arbitration agreement.*
>
> ***Explanation 2*** *– A mere application for time of file a written statement or a mere contest to an interlocutory application for injunction, appointment of Receiver or the like, shall not amount to taking any steps in the proceedings."*

10) The above section 34 of the Arbitration Act, 1940, provides that the objection as to the jurisdiction of the court on the ground of the arbitration agreement is to be raised before filing of the written statement. There is nothing on the record, which shows that the defendant (present appellant) raised the objection as to the jurisdiction of the court, before filing the written statement. As such, this Court finds no error of law committed by the trial court in rejecting the defendant's objection on that ground.

11) The third submission advanced on behalf of the defendant / appellant is this that the suit was filed without service of notice as required under Section 80 of the Code. Had there been no exemption granted by the trial court, I would have accepted the submission of learned Standing Counsel for the defendant / appellant, but the order sheet of original suit No. 26 of 1983, in which the impugned decree is passed, shows that the permission to file suit without service of notice under Section 80 was granted by the trial court on 01.07.1983 i.e. the day of intuition of suit. Since, the said permission was granted under sub-section (2) Section 80 of the Code, as such, the impugned judgment and decree cannot be interfered with on said ground.

12. For the reasons as discussed above, this appeal is liable to be dismissed. The same is dismissed. No order as to costs.

(Prafulla C. Pant, J.)

Dt: 2nd August, 2006.
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